

FEB 9 1990



Before the
COPYRIGHT ROYALTY TRIBUNAL
Washington, D.C.

In the Matter of:

1987 CABLE ROYALTY
DISTRIBUTION PROCEEDING

)
) Docket No.
) CRT 89-2-87CD
) Phase II
)
)
)

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF
THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

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Dated: February 9, 1990

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I. INTRODUCTION

1. The American Society of Composers, Authors and Publishers ("ASCAP") hereby submits its Proposed Findings of Fact and Conclusions of Law in accordance with the Copyright Royalty Tribunal's Rules, 37 C.F.R. § 301.53, and Order in this proceeding, dated December 5, 1989.

2. The record made by ASCAP and Broadcast Music, Inc. ("BMI") demonstrates that 67% of Music's Phase I share of the 1987 cable royalty fund ("Music's Phase I Award") should go to ASCAP and its members, and the balance to BMI and its affiliates.

II. BACKGROUND OF THIS PROCEEDING

3. On February 1, 1989, the Tribunal solicited comments from claimants as to whether a controversy existed concerning distribution of the 1987 cable royalty fund. 54 Fed. Reg. 5,119. Based upon those comments, the Tribunal determined that a controversy existed as to distribution of 1987 cable copyright fees both in Phase I and in Phase II, effective April 3, 1989. 54 Fed. Reg. 13,101 (March 30, 1989).

4. On April 14, 1989, all Phase I parties informed the Tribunal that a Phase I settlement had been reached: after deduction of a specified amount for National Public Radio, each of the remaining settling Phase I parties agreed to accept the same Phase I share of the remainder of the 1987 Basic, 3.75 and Syndex Funds as was allocated in the Tribunal's Final Determination in the 1983 Cable Royalty Distribution Proceeding. 54 Fed. Reg. 16,387 (April 24, 1989). The Music Category's share was therefore 4.5% of the total fund under the settlement. See 51 Fed. Reg. 12,792 (1986).

5. The Tribunal accepted the settlement and ordered a distribution of 100% of the Phase I awards that were not subject to Phase II controversies, as well as 100% of the awards in the Music, Noncommercial Television and

Program Suppliers Categories in which Phase II controversies existed (all parties involved represented that they would make any reimbursements necessary to reflect the ultimate award). 54 Fed. Reg. 16,387. In the Devotional Category, where a Phase II controversy also existed, the Tribunal distributed 80% of the Phase I award, and retained 20% as a reserve to satisfy claims of new claimants in that category. Id.

6. ASCAP and BMI were the only Phase II claimants remaining in the Music Category, and a controversy existed between them.^{1/} Pursuant to the Tribunal's Order dated July 12, 1989, ASCAP and BMI filed their Phase II Direct Cases on September 22, 1989.

7. On October 6, 1989, BMI filed Pre-Hearing Objections and moved to strike portions of ASCAP's direct case. ASCAP filed a Response on October 13, 1989. The Tribunal overruled BMI's objections by Order of October 24, 1989.

8. On October 25, 1989, ASCAP filed a Pre-Hearing Objection and Motion to Strike and BMI filed a Motion to Compel. ASCAP filed a Response to BMI's Motion on October 26, 1989; and BMI filed a Response on October 27,

^{1/} SESAC, ACEMLA and NAB all initially made claims to Music's award, but subsequently withdrew those claims.

1989. On October 27, 1989, the Tribunal ordered a pre-hearing conference, which was held on November 1, 1989.

9. At the pre-hearing conference, each party agreed to produce certain additional underlying documentation and, pursuant to the Tribunal's Order of November 1, 1989, each party's Motion was held in abeyance with a right to renew, pending receipt and review of the additional documentation. On November 17, 1989, BMI filed Comments stating that it would not seek a pre-hearing ruling on its Pre-Hearing Objections, but would pursue its objections, if any, at the hearings. By letter dated November 20, 1989, ASCAP advised the Tribunal that it would not renew its Motion, but would make its objections, if any, at the hearings.

10. On November 20, 1989, without objection, ASCAP filed a corrected version of its Direct Case; and on December 4, 1989, without objection, BMI filed a revised version of its Direct Case.

11. On December 14, 15, 18 and 19, 1989, the Tribunal conducted hearings with respect to the ASCAP and BMI direct cases. ASCAP's witnesses were Gloria Messinger, ASCAP's Managing Director, and Dr. Peter Boyle, ASCAP's Chief Economist. BMI's witnesses were Robert L. Ahrold, BMI's Vice President for Corporate Relations; Marvin L.

Berenson, BMI's Vice President Legal/Licensing; Alan H. Smith, BMI's Vice President of Research; and Dr. David E. Black, an economic consultant.

12. Pursuant to the Tribunal's Order dated December 5, 1989, ASCAP and BMI filed their Phase II Rebuttal Cases on January 10, 1990. On January 17, 1990, without objection, ASCAP filed a corrected version of its Rebuttal Case.

13. On January 18 and 19, 1990, the Tribunal conducted rebuttal hearings. ASCAP's witnesses were Ms. Messinger and Dr. Boyle; BMI's witnesses were Messrs. Smith and Berenson and Dr. Black. The record was closed at the conclusion of the rebuttal hearings.^{2/}

III. SUMMARY OF PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

14. ASCAP's entitlement to 67% of Music's Phase I Award is supported by the evidence submitted by both ASCAP and BMI. ASCAP's four different approaches to the valuation of performances of music on distant cable signals in 1987, and BMI's durational study of the music performed on distant

^{2/} References to the transcript will be made as "Tr. _____," followed by the witness's last name in parentheses if appropriate. References to witnesses' written statements will be made by witness name, identification of direct or rebuttal case and page number, e.g., "Messinger Direct at _____." References to ASCAP's exhibits will be made as "ASCAP Exh. _____." References to BMI's exhibits will be made as "BMI Exh. _____."

signals (with its errors and methodological flaws corrected), all reach the same conclusion: about two-thirds of the music carried on distant signals in 1987 was in the ASCAP repertory.

15. ASCAP and BMI have been involved in only one other Phase II controversy, in the 1978 Cable Royalty Distribution Proceeding. There, only limited evidence on actual performances was available, and that evidence related to performances of music on all local broadcast television stations.

16. The record before the Tribunal in 1978 required that its ultimate conclusion be drawn indirectly and by analogy -- from factors from the music licensing marketplace which were only remotely (if at all) related to the performance of music in non-network programs carried as distant cable signals.^{3/}

17. Whether or not those factors were appropriate in the 1978 proceeding, there have been two significant ensuing "changed circumstances": the availability of "Larson Data," which identifies and measures the significance of the distant signals actually carried, and

^{3/} In the 1978 proceeding, three Tribunal commissioners determined that the ASCAP/BMI split, after removing SESAC's share, was 55.7/44.3. 45 Fed. Reg. 63,041. Two commissioners concluded that ASCAP's share should be higher: a 62.0/38.0 split after removing SESAC's share. 45 Fed. Reg. 63,044.

the availability of "Nielsen Data," which measures the audience size and viewing of the programs carried on distant signals. These indisputable measures, together with music use information, now allow the Tribunal to know the music performances that actually occurred on distant cable signals in 1987, and to value those performances.

18. The record contains six different analyses of the actual performances of copyrighted music on distant signals in 1987. Those analyses, and the shares they yield, are as follows:

(1) ASCAP's 53-station survey, which determined the actual music use on a 53-station sample of the most significant distant signals (as shown by the Larson Data), and weighted it by the normal ASCAP distribution system: ASCAP 67%, BMI 33%;

(2) ASCAP's census of performances on WTBS during 1987: ASCAP 72%, BMI 28%;

(3) ASCAP's WTBS census, weighted by Nielsen audience data: ASCAP 67%, BMI 33%;

(4) ASCAP's analysis of music use on programming which, according to the Nielsen audience data, represented 43% of all distant signal viewing: ASCAP 67%, BMI 33%;

(5) BMI's durational survey, which measured the time occupied by music on the five top distant signals during a composite week, as supplemented by the addition of music on programming which BMI omitted, but otherwise using BMI's own methodology which was seriously flawed: ASCAP 58%, BMI 42%;

(6) BMI's durational survey, with both the omissions and methodological flaws corrected, and weighted by Nielsen viewing data: ASCAP 65%, BMI 35%.

19. Thus, ASCAP's share, based on the evidence submitted by both ASCAP and BMI, ranges from 58% to 72%.

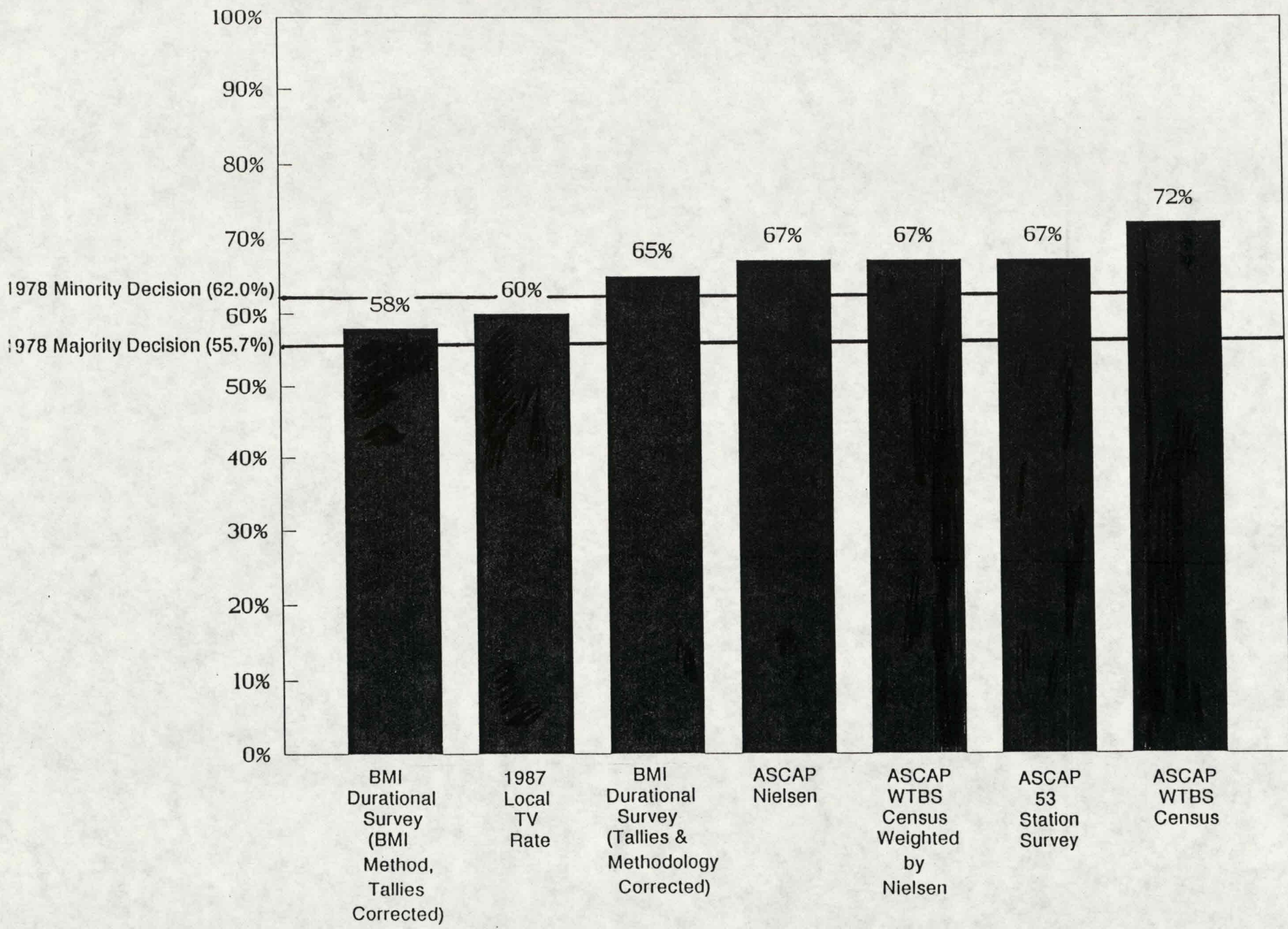
20. BMI urges the Tribunal to discount all evidence of actual music use, even its own corrected durational survey. Instead, BMI again would have the Tribunal revert to the indirect analogy of the music licensing marketplace. But, with only one exception, the licensing analogies BMI urges on the Tribunal have no relation whatsoever to distant signal carriage in 1987. Those analogies are inapplicable to the cable distant signal marketplace, either because they are unrelated to the music used on the mix of programming on distant signals (e.g., the 1987 rates paid by Country Music Television or the Nashville Network, cable origination services which specialize in programming containing only one type of music), because they

have no relevance to 1987 (e.g., the rates to be paid in 1991 and thereafter by television networks), or for both reasons.

21. The only exception of even limited relevance is the fees paid by local television stations. Even there, the analogy is strained for two reasons: 1) distant signals comprise a subset of all local stations, and a subset with a very different program and music mix, at that; and 2) BMI's local television rate is based on a "package deal" in which the local broadcasters paid for more than just a BMI license. The local television license fees actually paid for 1987 yield shares of: ASCAP 60%, BMI 40%.

22. Thus, the relevant facts and analyses in the record, which taken together define the "zone of reasonableness" within which the Tribunal may make an award, may be graphically represented by the diagram on the following page.

23. The record justifies an award to ASCAP of 67% of Music's Phase I Award.



IV. PROPOSED FINDINGS OF FACT

A. ASCAP's Case

1. ASCAP's Analysis of Actual Use of Copyrighted Music on Distant Cable Signals in 1987 Shows an ASCAP Share of about Two-Thirds

24. ASCAP presented four separate studies by which the Tribunal could identify and directly measure the value of the specific music contained in non-network programs carried as distant cable signals in 1987. Messinger Direct at 4; Tr. 469-472; Boyle Direct at 2-3; Tr. 577-578.

25. In its first approach, ASCAP used the Larson Data to weight actual music use on the 53 most significant distant cable signals. This resulted in an ASCAP share of about 67%. Boyle Direct at 3-14; Tr. 578-601.

26. In its second approach, ASCAP undertook a virtual census of 1987 performances on the most significant distant signal, WTBS -- the superstation which alone accounted for nearly 40% of all fees generated by distant carriage in 1987. This resulted in an ASCAP share of about 72%. Boyle Direct at 14-18; Tr. 605-618.

27. In its third approach, ASCAP weighted the results of its WTBS census by the Nielsen audience data. This resulted in an ASCAP share of 67%. Boyle Direct at 19-21; Tr. 623-628 (Boyle).

28. And, in its fourth approach, ASCAP used the Nielsen audience data to weight an analysis of music use on programs accounting for 43% of all distant signal viewing on all the stations Nielsen surveyed. This resulted in an ASCAP share of 67%. Boyle Direct at 21-22; Tr. 628-640 (Boyle).

29. Each of these approaches reflect four of the five criteria the Tribunal has applied to cable royalty distributions. Messinger Direct at 5-7; Tr. 423-477. The actual use of music on distant signals reflects the benefit to cable operators of that music use and the harm to the copyright owners engendered by that use. Messinger Direct at 5; Tr. 473. The actual use of music also reflects the marketplace's assessment of value -- both because use is a factor in determining license fees and because it is the only factor in determining royalty distributions. Messinger Direct at 5-6; Messinger Rebuttal at 208; Tr. 474-475, 1101-1109. And, as each of ASCAP's approaches has a time element, the time criterion is also taken into account.^{4/} Messinger Direct at 6; Tr. 475.

(a) The ASCAP Survey and Distribution System

30. Each of the four approaches ASCAP advocates in this proceeding includes surveys and weightings of

^{4/} The fifth criterion, quality, is discussed below.

performances as ASCAP has surveyed and weighted them for decades in the usual course of its business. Significantly, BMI has substantially the same kind of system, and approximately the same results would be derived if BMI's distribution system were substituted for ASCAP's in each approach. Tr. 651-652 (Boyle). This is so because both ASCAP and BMI weight different types of performances in similar fashion (e.g., feature performances earn far more than others). Tr. 569-570 (Messinger).

31. Of even greater significance, however, is the fact that ASCAP has approximately the same share of each different performance type: feature, theme and background. Tr. 652-653 (Boyle).^{5/} Indeed, because ASCAP's share of all performance types is approximately the same, ASCAP's share of music performed on distant cable signals in 1987 would be approximately the same whether measured by ASCAP's weighting formula, BMI's weighting formula, or any other weighting formula. Tr. 653, 663-664 (Boyle).

32. The purpose of the ASCAP survey and distribution system is to measure the performances of the works of each ASCAP member (and each member of affiliated foreign societies), so that each may equitably share in

^{5/} These three types of performances constituted approximately 93% of all performances in the 53-station survey. Tr. 649-650 (Boyle).

ASCAP royalty distributions. Tr. 668 (Boyle). In 1987, ASCAP distributed \$272 million to members and affiliated foreign societies, of which \$230 million was for domestic performances. ASCAP Exh. 15X. Over the years, billions of dollars have been distributed based on ASCAP's survey and distribution system. ASCAP Exh. 3.

33. The survey and distribution system also measures performances of music not in the ASCAP repertory, in the same manner as it measures performances of ASCAP works. Tr. 508 (Messinger).^{6/} By doing so, ASCAP can advise non-members of their potential royalties had ASCAP licensed their works. Tr. 573 (Messinger).

34. The ASCAP survey and distribution system is conducted and operated pursuant to court orders in United States v. ASCAP, Civil Action No. 13-95 (S.D.N.Y. March 14, 1950), as they have been amended from time to time. Boyle Direct at 6; Tr. 581-582. The survey design was created by outside experts and approved by the United States Bureau of the Census, the Justice Department, and the United States District Court for the Southern District of New York. Id. The Court maintains continuing jurisdiction over the ASCAP survey and distribution system to be sure it is fair. Id.

^{6/} Prior to 1980, and under certain very limited circumstances, the ASCAP survey did not tally performances of some durational background music not in the ASCAP repertory. Tr. 1144, 1147 (Messinger).

For this purpose, the Court has named Special Distribution Advisors who monitor the system and report on it semi-annually to the Court. Id. ASCAP's survey and distribution system is also subject to the on-going scrutiny of the Department of Justice. Id.

35. ASCAP samples about 95% of all local television stations for a total of 30,000 hours each year. Tr. 676 (Boyle). ASCAP obtains music performance information for the local television stations surveyed from TV Guide listings, cue sheets and audio tapes of the stations. Boyle Direct at 7; Tr. 583.

36. Each quarter, ASCAP processes all surveyed performances, on a title-by-title basis. Tr. 595-596, 717 (Boyle). Writers and publishers, and their performing rights society affiliations, are determined, and that information is entered in a computer data base that is continuously updated. Id.

37. After ASCAP identifies the music performed by stations in its local television survey, those performances are valued in units called "credits." Because performances vary in type and importance, ASCAP assigns different credit values to different types of performances. Tr. 502-503 (Messinger); Tr. 585 (Boyle). The kinds and degrees of

distinctions ASCAP may make are specified in the 1960 Order, as amended. ASCAP Exh. 3.

38. For example, in local television broadcasting, a feature performance, such as a visual-instrumental or vocal performance, is valued by ASCAP at 100% of a credit; other types of performances, such as theme, background or jingle, are valued at lesser percentages.^{7/} Tr. 502 (Messinger); Tr. 609-610 (Boyle).

39. Assigning different values to different types of performances reflects a common sense determination by BMI as well as ASCAP. BMI makes the same type of distinctions in the normal conduct of its distribution system. Tr. 569-

^{7/} ASCAP and BMI agree that, as a matter of absolute value, background music is extremely valuable and significant in films and television series. Tr. 1261-1262 (Stipulation of Counsel); see also 1983 Cable Royalty Distribution Proceeding, Music Exh. 6. As a matter of relative value, however, both ASCAP and BMI agree that feature performances are more valuable than background performances. Tr. 502 (Messinger); Tr. 609-610 (Boyle); ASCAP Exh. 24X.

For both ASCAP and non-ASCAP works, a work's performance history may result in additional credit for certain performances. Tr. 587 (Boyle). ASCAP and non-ASCAP works are treated in the same manner, and ASCAP maintains all information necessary to credit properly all works based on their performance history. Tr. 587 (Boyle). This historical or "familiarity" factor is accepted throughout the music industry: for example, works with a history of performances are more valuable when music publishers license synchronization rights. Tr. 798 (Boyle). BMI also takes performance history into account when valuing performances. Tr. 648 (Boyle); see also ASCAP Exh. 24X. However, the effect of any work's performance history on each of ASCAP's four approaches was minimal. Tr. 588-589, 718-719 (Boyle).

571 (Messinger); ASCAP Exh. 24X. While the actual weights ASCAP and BMI assign to different types of performances are no doubt marginally different, the two distribution systems are roughly comparable. Tr. 570, 572 (Messinger); Tr. 648 (Boyle). Neither organization uses duration alone as a basis for crediting works. Tr. 648 (Boyle).

40. Music publishers similarly assign different values to different types of performances when they negotiate synchronization licenses. Tr. 700-701 (Boyle). And the Tribunal has valued different types of performances differently in setting compulsory license fees for public broadcasting entities. 37 C.F.R. § 304.4(a); see Tr. 1336 (Black).

41. The ASCAP survey and distribution system is "blind" in that it samples, tallies and processes performances of all copyrighted music, whether in the repertory of ASCAP, BMI, SESAC, a foreign society or anyone else, entirely without regard to the music's ownership. Tr. 586 (Boyle). Thus, an ASCAP work and a BMI work, used in an identical way on the same program, would generate the same number of credits. Tr. 591 (Boyle).^{8/}

^{8/} BMI asserted that ASCAP failed to credit BMI with music that was purportedly entirely within the BMI repertory. Smith Rebuttal at 6-7; Tr. 1270-1271; BMI Exh. B-18R. This difference in crediting could well have derived from disputes as to who controls the rights to the songs in question. Tr. 1294-1295 (Smith).

42. BMI claimed that it was unable to replicate the results of the ASCAP survey and that therefore it did not know if the survey provided an accurate basis for determining ASCAP's and BMI's shares of the music performed on distant cable signals in 1987. Black Rebuttal at 1-5; Tr. 1311-1316. However, ASCAP provided BMI with data by which BMI could have verified the accuracy of ASCAP's crediting of performances.^{9/} Tr. 590, 750-751 (Boyle); BMI

^{9/} ASCAP provided BMI with six cartons of computer print-outs ("quarterly detail reports") detailing, on a song title-by-title, and program-by-program basis, all individual titles and specific performances processed by ASCAP for 1987 for all four of ASCAP's approaches. BMI Exh. X-2; Tr. 590 (Boyle). ASCAP also provided BMI with a "Guide to Quarterly Detail Reports," which explained line-by-line every term and code used on the quarterly detail report, and a "Credit Symbol Chart" which set forth the credit symbol, percentage of credit earned, and applicable weighting formula paragraph citation for each type of performance appearing in the quarterly detail report. BMI Exh. X-2; see ASCAP Exh. 3. ASCAP also produced cue sheets and other data which set forth the specific titles appearing on each program and showed how ASCAP coded each performance. Tr. 750 (Boyle).

The fact that BMI could have replicated the crediting was shown when BMI cross-examined Dr. Boyle regarding two specific examples of how ASCAP credited certain performances. In one instance, for the program "Maude's Guilt Trip" BMI presented Dr. Boyle with the program header sheet, the cue sheet and the applicable pages from the quarterly detail report, and Dr. Boyle explained the crediting step-by-step. Tr. 720-738 (Boyle); BMI Exh. X-4. In the other instance, BMI presented Dr. Boyle with two, non-sequential pages of the quarterly detail report and asked Dr. Boyle to explain an apparent discrepancy in the crediting of a given work. Dr. Boyle noted that he could not explain the crediting without seeing the same type of documentation with which he was cross-examined regarding the "Maude" episode, which documentation BMI had, but did not provide to him. Tr. 746-748 (Boyle); BMI Exh. X-5.

Exh. X-2; ASCAP Exh. 3.

- (b) ASCAP's First Approach: Music Use on Distant Cable Signals, As Measured by the ASCAP Survey and the Larson Data, Shows ASCAP's Share to be 67%
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43. ASCAP's first approach was to use the Larson Data in conjunction with ASCAP's survey of local television performances, and so to determine ASCAP's share of performances on distant signals. Boyle Direct at p. 3; Tr. 578-579.

44. According to the Larson Data,^{10/} there were approximately 620 television stations carried as distant signals in 1987.^{11/} Boyle Direct at 10; Tr. 591. The 64

^{10/} The Larson Data is compiled by Cable Data Corporation from Statement of Account Forms filed in the Copyright Office by "Form 3" cable systems, and aggregates the information filed by cable systems using three alternative measures of distant carriage: (1) fees-generated -- that is, the portion of the compulsory license fees paid by cable systems attributable to distant carriage of each broadcast station; (2) number of subscribers -- that is, the size of cable systems which carried each broadcast station as a distant signal, measured by the systems' number of subscribers; and (3) instances of carriage -- that is, the number of cable systems which carried each broadcast station as a distant signal. Boyle Direct at p. 4; Tr. 580. By use of the Larson Data, it is possible to identify and ascertain the relative significance of television stations carried as distant cable signals. Messenger Direct at 2; Tr. 468. ASCAP and BMI both agree that the Larson Data must be used to weight distant signal performance information. Tr. 1030-1031 (Smith).

^{11/} There were 608 such stations in the first accounting period of 1987 and 629 in the second accounting period. Boyle Direct at 10, n.10; Tr. 591.

stations which generated fees of \$100,000 or more accounted for 92.46% of all fees generated.^{12/} Id.

45. An analysis of all musical performances on all 620 distantly carried television stations was, for practical purposes, impossible. Id. Each additional station surveyed beyond the stations sampled would have accounted for less than 0.08% of all fees generated, and would not have significantly changed the outcome of ASCAP's analysis. Tr. 592-593 (Boyle). Therefore, ASCAP based its first study on these 64 stations. Boyle Direct at 10-11, Tr. 591.

46. ASCAP's survey of performances included 53 of these 64 stations.^{13/} Boyle Direct at 11; Tr. 591-592, 594. These 53 stations accounted for 90.68% of all fees generated, according to the Larson Data. Boyle Direct at 11; Tr. 592, 594-595; ASCAP Exh. 5.

47. ASCAP identified the music actually performed on these 53 television stations, as shown by the survey of

^{12/} These stations also accounted for 69.18% of all instances of carriage and 75.23% of all subscribers in 1987. Boyle Direct at 11, n.11.

^{13/} Nine of the 64 stations were Canadian and so did not appear in the ASCAP survey of local television performances. (ASCAP licenses only local television stations in the United States. Affiliated foreign performing rights societies license ASCAP's members' works in their countries.) Two other stations, WNUV-TV in Baltimore, Maryland and WFXT-TV in Boston, Massachusetts, did not appear in the ASCAP survey in 1987. Boyle Direct at 11; Tr. 591-592.

1987 performances. In the regular conduct of that survey, ASCAP sampled the programming of these 53 stations for 5,400 hours in 1987.^{14/} Tr. 593-594 (Boyle). The survey provides a reliable basis for comparing the relative uses of ASCAP and BMI music on the 53 stations sampled. Tr. 603, 756-758, 800-801 (Boyle).

48. ASCAP determined the credits generated by performances of copyrighted music on these 53 television stations, and then determined which of these performances were of compositions in the ASCAP repertory. Boyle Direct at 12; Tr. 593, 595. This information had been processed long before the commencement of this proceeding as part of ASCAP's normal business operations. Tr. 593, 595 (Boyle).

49. ASCAP then weighted the survey results by the Larson Data, to determine ASCAP's total share of performances of copyrighted music on the 53 stations. Boyle Direct at 13; Tr. 599-601; ASCAP Exh. 7.

50. ASCAP music on the 53 stations, when weighted by the Larson Data, accounted for approximately 67% of all copyrighted music on those stations during 1987, regardless of the Larson measure applied.^{15/} Boyle Direct at 13-14;

^{14/} No network performances were included in that study. Tr. 647 (Boyle).

^{15/} As previously noted, prior to 1980, and under certain limited circumstances, the ASCAP survey did not tally
(footnote continued)

Tr. 601.

(c) ASCAP's Second Approach: A Census
of Performances of Copyrighted Music
on WTBS Shows ASCAP's Share to be 72%

51. WTBS is by far the most significant distant signal. Tr. 599, 605 (Boyle). According to the Larson Data, it accounted for 37.59% of all fees generated in 1987. Boyle Direct at 14; Tr. 605. Therefore, in its second approach, ASCAP undertook as complete a census as possible of musical performances on WTBS during 1987.

52. In response to questioning concerning the relevance of WTBS's programming to all distant signals, Dr. Boyle noted that Turner Broadcasting, WTBS's owner, purchased the MGM film library as a source of a particular type of entertainment programming. Tr. 630 (Boyle). Had Turner Broadcasting not purchased the MGM film library, it would have fulfilled its need by purchasing other, similar programming which may well have contained ASCAP and BMI music in the same proportion as the MGM film library. Id.

53. In addition, Dr. Boyle testified, there is generally not a great shift in television programming from year to year. Therefore, it is reasonable to assume that

(footnote continued from previous page)
performances of some non-ASCAP durational background music. Tr. 1144, 1147 (Messinger). An adjustment to account for performances of this music in the 53-station survey would reduce ASCAP's share to 66%. ASCAP Exh. 41RX.

the programming mix on WTBS and the relative shares of ASCAP and BMI music will not change greatly over a short number of years. Tr. 658 (Boyle).

54. In any event, it is clear that WTBS was the single most important distantly carried television station in 1987. Tr. 479 (Messinger); Tr. 599, 605 (Boyle). ASCAP focused on WTBS because of the station's significance among distant signals in 1987, and would have analyzed any other equally significant station to the same degree. Tr. 630-631 (Boyle). As Chairman Argetsinger noted, 1987 "is the only year we really are concerned with here." Tr. 659. And WTBS's programming and music use were a fact of life in 1987. Tr. 479-480 (Messinger).

55. ASCAP used TV Guide listings to identify every program broadcast on WTBS in 1987. Boyle Direct at 14-15; Tr. 605-606, 610-611. Next, ASCAP identified the music performed on those programs, and which of those works were in the ASCAP repertory, relying primarily on cue sheets. Boyle Direct at 15-16; Tr. 610-611.

56. In some instances there were programs or series for which ASCAP had no cue sheets. Boyle Direct at 17; Tr. 616-617. In such circumstances, ASCAP referred to tape recordings made of the programs on one or more occasions in 1987 as part of the ASCAP survey. Id. ASCAP

used that information to determine the music used in those programs.^{16/} Id. ASCAP analyzed approximately 8,700 hours of programming in the WTBS census. Tr. 653-654 (Boyle).

57. ASCAP music accounted for 71.9% of the total credits for performances of copyrighted music on WTBS in 1987. Tr. 617-618 (Boyle); ASCAP Exh. 10.

(d) ASCAP's Third Approach: When Weighted by Nielsen Viewing Data, Use of ASCAP Music on WTBS Accounts for a 67% Share

58. In its third approach, ASCAP applied the Nielsen audience viewing data to the WTBS music census. Boyle Direct at 20-21; Tr. 623.

59. Starting with the 1979 Cable Royalty Distribution Proceeding, the Program Suppliers commissioned Nielsen to do a special study of distant signal viewing and audience size. 1979 Cable Royalty Distribution Determination, 47 Fed. Reg. 9,879, 9,880 (1982). Over the

^{16/} For example, the "Tom and Jerry Show" contained a variety of different cartoons and comedy shorts (such as "Three Stooges" and "Little Rascals" segments). Boyle Direct at 17, n.20; Tr. 616; Boyle Rebuttal at 3. ASCAP identified the mix of these cartoons and comedy shorts from its survey tapes, and then "rotated" cue sheets for them for the carriage of the "Tom and Jerry Show." Id. (Cue sheet "rotation" is a process by which the cue sheets for a series are assigned, one after the other, to otherwise undesignated episodes. This procedure is used by ASCAP in its regular course of business when it is unable to match cue sheets to specific broadcasts of particular programs. Boyle Direct at 17; Tr. 613-615.) For a number of programs with minimal music use, ASCAP had no cue sheet or survey information, and those programs were not included in the census. Tr. 613 (Boyle).

years, this "Nielsen Data" became the centerpiece of the Program Suppliers Phase I case. 1980 Cable Royalty Distribution Determination, 48 Fed. Reg. 9,552, 9,553 (1983); 1981 Cable Royalty Distribution Determination, 49 Fed. Reg. 7,845, 7,846 (1984); 1982 Cable Royalty Distribution Determination, 49 Fed. Reg. 37,653, 37,656 (1984); 1983 Cable Royalty Distribution Proceeding, 51 Fed. Reg. 12,792, 12,794 (1986). The Tribunal has come to rely on the Nielsen audience viewing data as the "single most important piece of evidence", and the "starting point" for its decisions. 47 Fed. Reg. 9,982; 49 Fed. Reg. 1,847; 49 Fed. Reg. 37,656; 51 Fed. Reg. 12,808.

60. The Nielsen special study surveys a sample of the approximately 120 most significant distant signals. Tr. 633 (Boyle). It identifies the audience size of the programs carried on each distant signal it surveys, for six months out of the year.^{17/} Boyle Direct at 20; Tr. 624-625.

61. ASCAP identified each of the programs carried on WTBS which were included in the Nielsen data, and for which ASCAP had music use information. Boyle Direct at 21; Tr. 624-625; ASCAP Exh. 11. ASCAP had already identified

^{17/} The Nielsen special study does not measure audience size, or include in any way, programs carried between 2:00 A.M. - 6:00 A.M. on weekdays and 2:00 A.M. - 7:00 A.M. on weekends. Tr. 626 (Boyle).

the music used in each of those programs in the WTBS music census previously described. Boyle Direct at 21; Tr. 625.

62. ASCAP then weighted the credits generated by the music in each program by the total number of viewers for each program, according to the Nielsen viewing data, controlling for the differing lengths of programs. Boyle Direct at 21; Tr. 625-628; ASCAP Exh. 11.

63. ASCAP's share of performances of all copyrighted music on WTBS, when weighted by the Nielsen audience viewing data, was 67%. Boyle Direct at 21; Tr. 628; ASCAP Exh. 11.

(e) ASCAP's Fourth Approach: When Weighted by Nielsen Viewing Data, Music Use on Programming Accounting for 43% of All Viewing on All Distant Signals Nielsen Sampled Results in an ASCAP Share of 67%

64. According to the Nielsen special study, the programs whose music use was analyzed in ASCAP's third approach accounted for 43.3% of all viewing on all distant signals Nielsen sampled.^{18/} Boyle Direct at 21; Tr. 634. If only films and syndicated series are counted, the music use on programs ASCAP analyzed accounted for 46.6% of viewing of all films and syndicated series on all distant

^{18/} The Nielsen total viewing of all programs on all sampled distant signals was 3,385,022,333 household hours. Boyle Direct at 21, n.23. The programs for which ASCAP had music use information account for 1,465,060,029 household hours of viewing on distant signals Nielsen sampled. Id.

signals Nielsen sampled.^{19/} Boyle Direct at 21-22; Tr. 634-635.

65. Accordingly, ASCAP applied the music use information to the Nielsen viewing data for these programs on all of the approximately 120 distant signals Nielsen sampled. Boyle Direct at 22; Tr. 635-637; ASCAP Exh. 12.

66. The result is an ASCAP share of 67%. Boyle Direct at p. 22; Tr. 640; ASCAP Exh. 12.

2. ASCAP's Evidence Relating to Awards

67. ASCAP presented evidence of awards which ASCAP writers and ASCAP works have won over the years.^{20/} Messinger Direct at 6; Tr. 475. For example, ASCAP works or members have won 126 Oscars during the period 1934 through 1987; a total of 62 Tony Awards during the period 1949 to 1987; 18 Grammys for Song of the Year since 1958; and 70 prime time Emmys since 1954. ASCAP Exh. 1.

^{19/} The Nielsen total viewing of films and syndicated series on distant signals it sampled was 2,797,033,374 household hours. Boyle Direct at 22, n.24. The film and syndicated series programs for which ASCAP had music use information accounted for 1,303,898,262 hours of viewing on distant signals Nielsen sampled. Id. This percentage (46.6%) is especially significant because the other programs which account for Nielsen viewing on distant signals are mostly sports programs, which do not use music as heavily as films and syndicated series do. Id.

^{20/} This evidence goes to the fifth criterion -- quality -- which the Tribunal has established in these proceedings. Messinger Direct at 6-7; Tr. 475-476.

68. In addition, 19 of 20 non-silent films recently selected for the National Film Registry contained exclusively or predominantly ASCAP music. Messinger Direct at 6-7; Tr. 475-476.

69. ASCAP Oscar winning films were carried at least 260 times on distant cable signals in 1987, and the ASCAP films selected for the National Film Registry were carried at least 101 times on distant cable signals in 1987. ASCAP Exh. 36R.

3. ASCAP's Evidence of "Changed Circumstances"

70. In the 1978 proceeding, the only evidence of actual music use was presented by means of the ASCAP local television survey and a different specially created BMI survey. 1978 Cable Royalty Distribution Determination, 45 Fed. Reg. 63,026, 63,041, 63,043 (1980). Neither the Larson Data, nor the Nielsen Data, was available. Messinger Direct at 2; Tr. 468.

71. In the ensuing years, however, the Larson Data and the Nielsen audience viewing data have become available. Id. Circumstances now have changed. Using the Larson Data and Nielsen audience data together with evidence of actual performances, the Tribunal may in 1987 do what it could not do in 1978: identify and directly measure the value of copyrighted music performed on distant cable signals. Boyle Direct at 2-3; Tr. 577.

B. BMI's Case

1. BMI's Evidence of Actual Use of Copyrighted Music on Distant Cable Signals in 1987, When Corrected for Errors and Methodological Flaws, Shows an ASCAP Share of 65%

72. BMI also undertook a survey of the music actually performed on distant cable signals in 1987. Smith Direct at 4; Tr. 991. As in the 1978 proceeding, BMI chose to ignore its normal distribution procedures. Tr. 998, 1011, 1013-1014 (Smith); ASCAP Exh. 24X.

73. BMI normally makes distinctions between different types of performances in much the same way both ASCAP and the music business generally do. Tr. 502-503 (Messinger); Tr. 585, 700-701 (Boyle). Instead, BMI here valued all performances, regardless of type as if they were of equal value, on the basis of duration alone.^{21/} Id.

74. For this 1987 durational survey, BMI analyzed programming on the top five distant signals, WTBS, WGN, WWOR, WPIX and WSBK, for a seven-day composite week. Smith Direct at 4-5; Tr. 992.

75. BMI could have sampled a maximum of only 840 hours of programming in its five station-composite week survey, compared to the 5,400 hours ASCAP analyzed in the 53-station survey and the 8,700 hours ASCAP analyzed in the

^{21/} In the 1978 proceeding, BMI valued all performances identically, regardless of type or duration. Smith Direct at 5; Tr. 993; 45 Fed. Reg. 63,043.

WTBS census. Tr. 1024-1025 (Smith); Tr. 593-594, 653-654 (Boyle).

76. The five stations BMI surveyed generated approximately 80% of the fees generated by distant cable stations in 1987, according to the Larson Data. Smith Direct at 6; Tr. 993. To account for the remaining stations, BMI averaged the data for four of the five stations (WGN, WWOR, WPIX and WSBK, but not WTBS), and attributed the resulting averages to a hypothetical sixth station, "WRST." Smith Direct at 6; Tr. 993-994. BMI ~~excluded~~ WTBS from this calculation because of its "disproportionately high" film programming. Smith Direct at 6; Tr. 993-994. The programming BMI excluded contains far more ASCAP than BMI music. BMI Exh. B-8; ASCAP Exh. 10.

77. BMI used TV Guide data to identify programming that appeared on the five stations during the composite week, and used cue sheets to determine the duration of the music contained in those programs. Smith Direct at 7-8; Tr. 996.

78. When BMI did not know the particular episode of a syndicated television series, it created an "average cue sheet" for that series. BMI claimed its procedure was to use a "random sample" of 13 cue sheets on file for that series and, from those 13, to construct an "average cue

sheet." Smith Direct at 8; Tr. 996. In fact, BMI's cue sheet selection was not random: BMI files its cue sheets alphabetically or chronologically. Tr. 1026-1028 (Smith); ASCAP Exh. 21X. In every case, it selected the first 13 cue sheets in its file. Tr. 1025-1026 (Smith). Thus, it systematically excluded cue sheets for episodes whose titles did not begin with the first letters of the alphabet, or which were produced after approximately the first half of the first season of the show's production. Boyle Rebuttal at 15-16; Tr. 1090-1092 (Black); ASCAP Exh. 21X. The problem with this methodology was shown by the program ":20 Minute Workout," which used mostly BMI music for its early episodes, but used more ASCAP music in its later episodes; because BMI analyzed cue sheets only from the early episodes, it omitted ASCAP music. Boyle Rebuttal at 16.

79. BMI aggregated the duration of BMI music compared to "Other" (i.e., non-BMI) music. BMI Exh. B-8. BMI also distinguished between music in films and music in syndicated television series. Id.

80. BMI weighted the data for each of the stations by multiplying the BMI and "Other" music percentages of aggregate music duration by the percentage of time occupied on each station by films and syndicated television series, as shown by the Nielsen special study. Smith Direct

at 10-11; Tr. 999; BMI Exh. No. B-9. In this manner BMI claimed to have employed the "Nielsen Data." Id. In fact, BMI merely used the Nielsen special study as a stopwatch -- it could have used TV Guide for the same information. Boyle Rebuttal at 10; See Tr. 1067-1068 (Smith).

81. BMI then applied the Larson Data to its results. Smith Direct at 9, 11-12; Tr. 999; BMI Exh. No. B-10. From these calculations, BMI concluded that its share of all musical performances carried on distant signals in 1987 was 47.2%. Smith Direct at 12; Tr. 999.

82. Finally, based only on Mr. Smith's "opinion," BMI estimated that 5% of all music on distant signals was neither ASCAP nor BMI music. Smith Direct at 12-13; Tr. 1000-1001. On this basis, BMI concluded that, relative to ASCAP, its share of all music performed on distant cable signals in 1987 was 49.7% and that ASCAP's share was 50.3%. Smith Direct at 12; Tr. 1000.

83. To rebut Mr. Smith's guess with facts, ASCAP took all the cue sheets which BMI provided in document production for WTBS programming, and identified the duration of all the non-ASCAP and non-BMI music on them. Boyle Rebuttal at 13; Tr. 1202. (ASCAP used WTBS because public domain music is found more frequently in films than in series, and WTBS has a higher concentration of films than

other stations. Tr. 1204 (Boyle). Thus, this analysis of WTBS programming results in a higher estimate of non-ASCAP music and so is more favorable to BMI than analysis of another distant signal's programming would be. Id.) This non-ASCAP, non-BMI music accounted for only 3.0% of the total music duration, with the vast bulk being public domain music. Boyle Rebuttal at 13; Tr. 1202.

84. BMI's durational survey was rife with errors, both in methodology and in execution. Boyle Rebuttal at 2-16. If the errors and methodological flaws in BMI's analysis were corrected, ASCAP's share would be about 65%. Tr. 1182 (Boyle).

85. First, in its tallying of cue sheets, BMI counted the wrong music, drastically underrepresented the duration of all music on certain significant programs, and also drastically underrepresented the duration of ASCAP music on those programs. Boyle Rebuttal at 2; Tr. 1182.

86. One example was the Tom & Jerry program, carried on WTBS and WPIX. In its processing of the Tom & Jerry program, BMI tallied only cue sheets for "Tom and Jerry" cartoons. Boyle Rebuttal at 2-3; Tr. 1172. However, the Tom & Jerry program does not consist of only "Tom and Jerry" cartoons. Rather, as tapes of the program made during 1987 reveal, the show contains many different

elements -- such as "Three Stooges" and "Little Rascals" live-action films, and cartoons other than "Tom and Jerry" -- which contain music BMI omitted. Boyle Rebuttal at 3.

87. To correct this error, ASCAP analyzed the duration of the omitted music by using cue sheets for all the different elements of the Tom & Jerry program. Boyle Rebuttal at 3; Tr. 1183. ASCAP did so using the identical methodology BMI claimed to have followed -- that is, if ASCAP could identify the particular cartoon or short feature carried, ASCAP used the cue sheet for that particular cartoon or feature; if ASCAP could not, it drew a sample of cue sheets in the same way BMI did and used it to derive an "average" cue sheet. Id.

88. BMI's error in tallying music use on this one program alone was not minor: Tom & Jerry appeared on WTBS 11 different times, occupying 15 hours, during BMI's composite week.^{22/} Boyle Rebuttal at 3; Tr. 1186. The Tom & Jerry program contained an average of 28.73 minutes of music per hour, or a total of 430.95 minutes of music during a week on WTBS. Boyle Rebuttal at 3-4. But BMI used only one "Tom and Jerry" cartoon cue sheet -- about 6.78 minutes of music -- for each occurrence of the program. Boyle

^{22/} The Tom & Jerry program also appeared on WPIX for one-half hour during BMI's composite week. Boyle Rebuttal at 3, n.2.

Rebuttal at 4; Tr. 1182, 1186. That is to say, BMI tallied a total of only 74.62 minutes of Tom & Jerry program music, rather than the actual 430.95 minutes of music, during the WTBS composite week. Boyle Rebuttal at 4; Tr. 1186 (Boyle).

89. The 356.33 minutes of Tom & Jerry music BMI omitted equals 42.4% of the total WTBS "TV" music which BMI tallied. Boyle Rebuttal at 4; Tr. 1187. And, the overwhelming proportion of the omitted music -- 319.05 out of 356.33 minutes, or 90% -- was ASCAP music. Id. Thus, BMI drastically underrepresented ASCAP's total music duration on this very significant program (in the durational sense which BMI advocates). Boyle Rebuttal at 4.

90. On cross-examination of Dr. Boyle, BMI inquired if ASCAP's recalculation of the music used on Tom & Jerry had accounted for BMI's preponderant share of music on "Heckle and Jeckle" cartoons, which are among the segments used in the program. Tr. 12; BMI Exh. XR-2B. Dr. Boyle testified that ASCAP had indeed included "Heckle and Jeckle" cartoons in its recalculation of Tom & Jerry, and that ASCAP credited BMI with 233 seconds of music and ASCAP with only 63 seconds on the "Heckle and Jeckle" segments. Tr. 1240-1242.

91. BMI's tally of music on the Bozo program on WGN is another illustration of the same type of inaccuracy.

Once again, BMI tallied the wrong music and undercounted the duration of all music on this program. And, once again, these omissions are very significant on the durational basis which BMI advocates. Boyle Rebuttal at 4-5; Tr. 1187-1188.

92. Based on the cue sheets for the cartoons which were actually carried on the Bozo program, ASCAP found that 170.82 minutes of music should have been tallied. But, BMI tallied only 22.20 minutes. Boyle Rebuttal at 6-7.

93. BMI also ignored information in its own records on music use. For example, the GI Joe and Transformers cartoon programs were carried on stations WPIX and WGN. BMI credited to itself much of the music in these cartoons, which was written by a PRS member, Johnny Douglas, and published by an ASCAP publisher, Wildstar Music, Inc. Boyle Rebuttal at 6-7; Tr. 1188-1189. But the music was licensed through ASCAP, as BMI knew and acknowledged long before this proceeding began. Id.; ASCAP Exh. 32R. In correcting the tallying for GI Joe and Transformers, ASCAP changed only the crediting for works composed by Mr. Douglas; all other music in those two programs credited to BMI remained credited to BMI. Tr. 1244 (Boyle).

94. BMI also drastically undervalued total music duration and the duration of ASCAP music because they did not tally music use in any programs for which they did not

have cue sheets. Boyle Rebuttal at 7. This was a substantial error, because one of the programs was Night Tracks on WTBS. Night Tracks occupied about 13 hours a week, and, as BMI's own witness admitted, contained virtually "wall-to-wall music." Boyle Rebuttal at 7; Tr. 1190 (Boyle); Tr. 1054-1055 (Smith). BMI had attempted to get performance information for Night Tracks for its direct case from the producer, was unable to do, and so simply ignored this significant use of music. Tr. 1286-1288 (Smith).

95. Tapes of Night Tracks made during 1987 proved that the show accounted for 593.95 minutes of music duration during BMI's composite week; BMI entirely omitted this music duration from its tallying. Boyle Rebuttal at 7-8; Tr. 1190-1191. The omitted Night Tracks music represents 30% of all music duration BMI tallied on WTBS, according to BMI's own figures. BMI Exh. B-8. BMI's omission of Night Tracks music is thus another very significant error. Boyle Rebuttal at 7-8; Tr. 1190-1191.

96. Mr. Smith guessed that the music use on Night Tracks would be split 50/50 between ASCAP and BMI. Tr. 1055. But analysis of all of the tape recordings of the program made by ASCAP in 1987 show that ASCAP music accounted for 69%, and BMI music 31%, of the total Night

Tracks music duration. Boyle Rebuttal at 8; Tr. 1191. And, on cross-examination of Dr. Boyle during rebuttal, BMI introduced Night Tracks "cue sheets" for the programs carried during BMI's composite week which they had obtained from the producer for rebuttal, and which showed BMI's share of Night Tracks total music duration to be only 43%. Tr. 1219-1222 (Boyle); BMI Exh. XR-3. By omitting Night Tracks, BMI again significantly overstated its share of total music duration, and significantly shortchanged ASCAP. Boyle Rebuttal at 8; Tr. 1191.

97. All of BMI's omissions and mistalliyings which ASCAP found and could quantify were set forth in ASCAP Exh. 34R.

98. BMI also made a serious methodological error when it weighted the percentage of music duration on "Film" and "TV"^{23/} program types on each of the five stations (and the "composite" station), by the percentage of time occupied by "Film" and "TV" programs on those stations. Boyle Rebuttal at 8; Tr. 1194. By doing so, BMI was assuming that the average music duration per hour on "Film" programs was equal to the average music duration per hour on "TV" programs -- giving the two program types a one-for-one

^{23/} By the designation "TV," it appears BMI meant non-motion picture syndicated television programs. Smith Direct at 8.

equivalence of music density on each station. Boyle Rebuttal at 9; Tr. 1194-1195. The error is that the average music duration -- the music density -- is not equivalent on the two programming types on any of the stations. Id. Thus, wild inaccuracies result. ASCAP Exh. 28X; Boyle Rebuttal at 9-10; Tr. 1195-1198.

99. BMI made yet another serious error by using the Nielsen Data simply as a measure of program time -- as a stopwatch -- rather than as a measure of audience size. Tr. 1067-1069, 1071 (Smith); Boyle Rebuttal at 10. Every time the Nielsen Data has been used and relied upon by the Tribunal in prior proceedings, that reliance has been placed on ~~the~~ Nielsen Data as a measure of audience size. 47 Fed. Reg. 9,881, 9892; 48 Fed. Reg. 9,562; 49 Fed. Reg. 7,846; 51 Fed. Reg. 12,794, 12,800, 12,808, 12815. Therefore, if, as BMI claims, the duration of music is the measure of value which should be weighted by "Nielsen Data," that weighting should be by the audience size, not time occupied.^{24/} Boyle

^{24/} The correction cannot be made additively, as Dr. Boyle demonstrated on cross-examination. Tr. 1227-1231 (Boyle).

If one were to ignore the corrections to BMI's music duration tallying detailed in ASCAP Exh. 34R, and simply correct the flaw in BMI's methodology by weighting the actual music duration of each station's "Film" and "TV" programs, as given in BMI Exh. B-8, by the Nielsen audience data for each program type on each station, and then by the Larson Data, as given in BMI Exh. B-10, the result would be a non-BMI share of 62.4%. Boyle Rebuttal at 39, n.19.

Rebuttal at 10-11; Tr. 1198-1199.

100. If only the errors of omitted and mistallied music in BMI's durational survey are corrected, BMI's flawed methodology is otherwise used, and the proper share of non-ASCAP and non-BMI music duration is removed, BMI's own durational survey yields an ASCAP share of 58%. Tr. 1245 (Boyle).

101. When the inaccuracies in BMI's cue sheet analysis and the flaw in BMI's weighting methodology are both corrected, the Nielsen Data is used as a measure of audience size and not as a stopwatch, and the proper share of non-ASCAP and non-BMI music duration is removed, ASCAP's share is 65%. Boyle Rebuttal at 11-12; Tr. 1199-1202; ASCAP Exh. 35R.

2. BMI's Evidence Drawn From the Music Licensing Marketplace Is Almost Entirely Irrelevant

102. BMI introduced evidence concerning ASCAP and BMI licensing of music users which, it claimed, paralleled the factors which the Tribunal relied upon in 1978 when no objective data concerning music use on distant signals was available. Berenson Direct at 6; Tr. 872-873. That evidence was as follows:

103. Total License Fees: ASCAP's share of the combined ASCAP and BMI 1987 license fee revenues is 59.5%. BMI Exh. B-1 (Revised). This figure includes revenues from

all sources, many of which are not related to music use on distant signals. Tr. 889-893 (Berenson); ASCAP Exhs. 14X, 15X.

104. BMI referred to its representation of the repertoires of foreign performing rights societies. Ahrold Direct at 6; Tr. 832. It agreed that the measure of the relative values of the foreign repertoires ASCAP and BMI represented in the United States was the amount of royalties each distributed to foreign societies. Tr. 843 (Ahrold). Such distributions for 1987, expressed in percentages, are as follows:

<u>Country (Society)</u>	<u>ASCAP</u>	<u>BMI</u>
Britain (PRS)	77.9%	22.1%
France (SACEM)	88.3	11.7
Japan (JASRAC)	75.7	24.3
Australia (APRA)	70.3	29.7

Messinger Rebuttal at 12-13; ASCAP Exh. 30R.

105. Local Television License Fees: BMI's local television license rate for 1987 is currently 68% of ASCAP's, and may become 70% of the ASCAP rate. Messinger Rebuttal at 8-9; Tr. 1115-1116 (Messinger); Tr. 896-899 (Berenson); ASCAP Exh. 17X (exh. "A", p. 4). At present, however, and assuming that all licensed television stations have paid BMI all they owed for 1987, BMI television revenues would have been 40.5% of the combined ASCAP and BMI

local television revenues for 1987; ASCAP's share would have been 59.5%. Tr. 897 (Berenson).

106. In addition, the fees paid to BMI by local television broadcasters include payment for additional consideration besides the value of the license: The local television broadcasters and BMI made a "package deal" in 1985, only one of whose elements was the license. Messinger Rebuttal at 9; ASCAP Exh. 18X. BMI also agreed to dismiss a meritorious antitrust lawsuit it had brought against the local television broadcasters, agreed to ask the Department of Justice to establish a mechanism for court determination of reasonable license fees similar to the mechanism for court determination of such fees found in the ASCAP consent decree, and agreed to withdraw its objections to a special shareholders meeting of its broadcaster owners which would restructure the BMI Board.^{25/} ASCAP Exhs. 18X, 29R. BMI's

^{25/} On cross-examination of Ms. Messinger, BMI challenged the notion that music users such as the local television broadcasters would find a mechanism for court determination of reasonable license fees advantageous. Tr. 1157-1159. In fact, the absence of such a mechanism is a valuable negotiating tool for BMI. Tr. 1175 (Messinger). Just how valuable is shown by two lawsuits filed after the record closed, of which the Tribunal may take administrative notice: the cable trade associations and many cable program services have sued BMI for antitrust violations, and seek, inter alia, a mechanism for court determination of BMI license fees comparable to that in existence for ASCAP. NCTA v. BMI, No. 90-0209 (D.D.C. filed January 30, 1990); American Television and Comm. Corp. v. BMI, No. 90-0447 (C.D. Cal. filed January 29, 1990).

President at the time characterized the "package deal" thusly: "Both sides gave up something for something in return." Messinger Rebuttal at 9; ASCAP Exh. 29R.

107. Radio Performances: BMI submitted a claim of its share of all radio airplay, although its witnesses admitted that they had no idea which of the radio stations on which BMI based its claim were carried as distant cable signals in 1987. Tr. 922 (Berenson). Although BMI claimed that it had 53% of all 1987 radio performances, it offered no support for this claim to the Tribunal or in document production, beyond a single sheet of paper with that number on it. Tr. 920-921 (Berenson); ASCAP Exh. 19X. BMI's witness could not offer any further support for BMI's claim, beyond the statement that it came from BMI's normal distribution survey. Tr. 920-921 (Berenson).

108. BMI's witness agreed that WFMT-FM was one of the most heavily carried distant commercial radio stations. Tr. 923 (Berenson). ASCAP's share of performances on WFMT-FM in 1987 was approximately 86%. Boyle Rebuttal at 14-15.

109. The Tribunal has characterized the radio portion of Music's Phase I Award as "de minimus," "unquantifiable," "incalculable" and "extremely small." 49 Fed. Reg. 20,051; 49 Fed. Reg. 28,091.

110. Jukebox Royalty Fees: By voluntary agreement, ASCAP and BMI shared equally in the distribution of the 1978 jukebox royalty fund. 45 Fed. Reg. 63,041; BMI Exh. B-4. The 1978 voluntary jukebox agreement was made expressly on a non-prejudicial basis. 45 Fed. Reg. 63,043. In all subsequent years, ASCAP, BMI and SESAC have reached voluntary agreements for the distribution of jukebox royalty fees which by their terms are expressly confidential. Berenson Direct at 11; Tr. 879.

111. Public Broadcasting (PBS) Fees: For 1978, the Tribunal determined that PBS would pay ASCAP \$1.25 million annually pursuant to the compulsory license provision of the Copyright Act, 17 U.S.C. § 118. 1978 Noncommercial Broadcasting Rate Adjustment Proceeding, 43 Fed. Reg. 25,068, 25,069 (1978). Also for 1978, BMI entered into a voluntary agreement with PBS at an annual license fee of \$250 thousand. Tr. 932 (Berenson). The Tribunal may take administrative notice that ASCAP and PBS voluntarily agreed upon a 1987 license fee payment of \$2.66 million. ASCAP - Public Broadcasting Agreement dated October 28, 1982, filed in United States Copyright Office. BMI refused to submit any evidence regarding its 1987 public broadcasting license fee on the ground that the agreement was confidential. Berenson Direct at 12; Tr. 878, 926.

112. Noncommercial, Non-NPR Radio: BMI offered into evidence the Tribunal-determined compulsory license fees for non-NPR noncommercial radio stations. Berenson Direct at 12; BMI Exh. B-5; Tr. 879. The Tribunal's determination stated explicitly that the rates are not to be used for the comparative purposes for which BMI offered them.^{26/} 47 Fed. Reg. 57,923, 57,925 (1982).

113. Network Television: In the 1978 proceeding, no evidence was presented concerning the licensing of television networks by ASCAP and BMI. However, in this proceeding, BMI claimed that ASCAP's share of the combined ASCAP and BMI 1987 network television license revenues was 54%. Berenson Rebuttal at 2; Tr. 1371. In each of its network television license agreements, BMI's license fees will be dependent on whatever ASCAP negotiates with these users for itself. Tr. 1390 (Berenson).

114. BMI introduced no evidence on the similarity or dissimilarity of music use on networks compared to distant signals. Copyright owners of works included on network programs are not entitled to claim cable royalties under the compulsory license. 17 U.S.C. § 111(d)(3).

^{26/} The Tribunal stated: "The performing rights societies in the 1982 public broadcasting proceeding made a joint presentation. On the particular circumstances of this proceeding it would not be appropriate for the Tribunal to use the ratios established herein as a precedent in any other Tribunal proceeding, or for any purpose."

115. Home Box Office (HBO): In the 1978 proceeding, no evidence was presented concerning the licensing of HBO by ASCAP and BMI. For 1987, BMI negotiated a license fee for HBO of 12¢ per subscriber. Berenson Rebuttal at 2; Tr. 1371. The BMI-HBO license agreement was dated as of December 16, 1985. Tr. 1388 (Berenson). On the next day, December 17, 1985, HBO offered to enter into an ASCAP license agreement and to pay ASCAP license fees of 24.1¢ per subscriber. ASCAP Exh. 44RX.

116. ASCAP and HBO were unable to reach voluntary agreement on a license fee for 1987, and HBO commenced a proceeding pursuant to the ASCAP Consent Decree for determination of a reasonable fee. BMI Exh. 24R. Currently, HBO is paying ASCAP 15¢ per subscriber for 1987 on an interim fee basis, subject to adjustment retroactive to 1987 when a final order is issued. Id. at 11-12, 24.

117. BMI introduced no evidence on the similarity or dissimilarity of music use on HBO compared to distant signals. HBO is a cable origination service; copyright owners of works included on cable origination services are not entitled to claim cable royalties under the compulsory license. 17 U.S.C. § 111(d)(3).

118. Country Music Television and Nashville Network: In the 1978 proceeding, no evidence was presented

concerning the licensing of Country Music Television by ASCAP and BMI. For 1987, BMI negotiated a license agreement by which BMI would receive license fees equal to 1% of Country Music Television's net revenues. Berenson Rebuttal at 3-4; Tr. 1373. Commencing May 9, 1989, Country Music Television paid ASCAP license fees equal to 0.7% of Country Music Television's gross revenues on an interim basis, subject to adjustment upon issuance of a final order. BMI Exh. B-24R at 24. No evidence was presented concerning license fees Country Music Television may have paid ASCAP for 1987.

119. In the 1978 proceeding, no evidence was presented concerning the licensing of Nashville Network by ASCAP and BMI. For 1987, BMI received 55% of the combined ASCAP and BMI license fees paid by Nashville Network. Berenson Rebuttal at 4; Tr. 1373.

120. Part of the reason that BMI receives a higher license fee than ASCAP from Country Music Television and the Nashville Network is that BMI has "a good portion of country music." Tr. 1382. BMI introduced no evidence on the similarity or dissimilarity of music use on these cable origination services compared to distant signals.

3. BMI's Evidence of Awards and Miscellaneous Matters

121. Awards: BMI presented evidence of awards received by BMI affiliated writers and BMI works. Berenson Direct at 13-15; Tr. 879-881.

122. BMI claimed that it "licensed 77.0%" of the albums which received Gold Certifications by the Recording Industry Association of America in 1987. Berenson Direct at 13; Tr. 879. However, on cross-examination, it emerged that BMI claimed to "license" each album in which BMI had some share of at least one song, no matter how small. Tr. 937 (Berenson). Thus, for example, BMI claimed to "license" an album by the "Pet Shop Boys" even though 95% of the rights to ~~the~~ songs in that album were licensed by ASCAP and only 5% were licensed by BMI. Tr. 940 (Berenson); ASCAP Exh. 20X.

123. In rebuttal, as requested by the Tribunal, ASCAP and BMI each separately analyzed all of the songs contained on all 142 albums which received RIAA Gold Certifications in 1987: BMI's analysis showed that only 43.67% of the rights to those songs were licensed by BMI. BMI Exh. XR-6. ASCAP's analysis showed that ASCAP licensed 56.9% of the rights to the songs contained in the Gold Albums; and that, on a durational basis, ASCAP music occu-

pied 58.4% of the time on those albums. Messinger Rebuttal at 12.

124. Television Programs: BMI also claimed that, in 1987, it "licensed" 14 of the top syndicated television programs and 70 of the prime-time network television shows. Berenson Direct at 13; Tr. 880. As with BMI's claim regarding its right to "license" the RIAA Gold Albums, BMI claimed that it "licensed" a television program if it had any interest in any composition performed in conjunction with the program, no matter how small. Tr. 945 (Berenson). Thus, for example, BMI included "Cheers" in its count when all the music in the program was licensed by ASCAP except for the Paramount TV "logo" which BMI licensed. Tr. 947-948 (Berenson); ASCAP Exh. 21X.

125. Films: BMI also claimed that it "licensed over 50% of the domestic films released in 1987 that were scored by U.S. composers." Berenson Direct at 14; Tr. 880; BMI Exh. B-6. BMI claimed to be unable to determine the performing rights society affiliation of some of the film scores listed, and did not specify whether the works composed by foreign affiliated writers were licensed in the United States by ASCAP or BMI. BMI Exh. B-6. ASCAP, on the other hand, was able to determine the performing rights society affiliation in many of those cases, also was able to

specify whether ASCAP or BMI licensed the works of the foreign writers in question. ASCAP Exh. 22X. ASCAP licensed 47.7% of the rights to the scores of the domestic films released in 1987, BMI licensed 41.6%, and the remainder could not be determined. Id.; see also Tr. 950-958 (Berenson). When the films whose writers' affiliations cannot be determined are removed from the calculation, BMI "licensed" 46.6%, and not "over 50%" of 1987 domestic films. ASCAP Exh. 22X.

126. With respect to its film and awards evidence, BMI offered no proof that any of the films released in 1987 which it cited were included in distant signals in 1987. As a general rule, films are not syndicated in the same year in which they were released. Tr. 950 (Berenson).

4. The Syndex Fund

127. BMI claimed that the advent of the Syndex Fund was a "changed circumstance" in this proceeding. BMI's witnesses swore that the Syndex Fund "reflects payments solely for the ability to duplicate syndicated television shows", and that "[f]ilms are not duplicated and do not account for Syndex royalties." Berenson Direct at 5; Tr. 872; Smith Direct at 13; Tr. 1002. In rebuttal, however, Mr. Smith acknowledged that BMI's understanding of the Syndex Fund was wrong as a matter of law. Smith

Rebuttal at 8-9; Tr. 1274; see also Tr. 966, 969 (Berenson); Cable Television Syndicated Program Exclusivity Rules, 79 F.C.C.2d 663 (1980); Report and Order, 3 F.C.C. Rcd. 5299 (1988).

128. BMI's witnesses claimed that syndicated television series are duplicated to a greater extent than are movies. Tr. 1002 (Smith). BMI offered no statistical support for this proposition. Instead, BMI represented that evidence submitted to the FCC for the year 1987 indicated that "as a matter of fact the majority of concerns about program duplication involved syndicated television programming only." Smith Rebuttal at 9; Tr. 1274. However, the FCC filing by the TVX Broadcast Group, produced by BMI during document production, stated that TVX was concerned that "a high percentage of the TVX stations' movie packages are duplicated by at least one distant signal." Tr. 1305-1306 (Smith).

V. CONCLUSIONS OF LAW

A. ASCAP's Share of Copyrighted Music Actually Performed on Distant Cable Signals in 1987 is Between 65% and 72%

129. Both ASCAP and BMI say that the Tribunal's determination should be based on the actual performance of copyrighted music on distant signals in 1987. ASCAP speaks of the "hard data" concerning such performances as shown by

the Larson Data, the 53-station survey of performances, the WTBS census of performances, and the Nielsen data.

Messinger Direct at 7; Tr. 499-500, 1105-1106. BMI speaks of "objective surveys of music use," as illustrated by its durational survey specially prepared for this proceeding.^{27/} Black Rebuttal at 9; Tr. 1344-1345.

130. The difference between the basic ASCAP and BMI approaches is merely in the way each values different types of musical performances: ASCAP urges the Tribunal to apply the same values to different types of performances as both ASCAP and BMI do every day in the marketplace. There are four reasons why this valuation is proper and should be accepted by the Tribunal.

131. First, it is universally accepted within the music industry. The weighting formulas used by ASCAP and BMI are very similar. Both value feature performances at multiples of other types of performances, notably performances of background and theme music.^{28/}

^{27/} Perhaps because the survey numbers are not to BMI's liking, BMI tempers its enthusiasm for "objective surveys" with a call for the Tribunal to look at extraneous information as well.

^{28/} Both also to some degree take into account the familiarity and popularity of a work -- as shown by its record of prior performances -- in valuing its performance as background or theme music. BMI suggests that this improperly makes pre-1987 performances a part of the 1987 distribution. That is wrong: the fact that a work is more
(footnote continued)

132. Second, the evidence is unchallenged that ASCAP music predominates, in approximately the same ratio, within each type of musical performance on distant signals. ASCAP has roughly two-thirds of all feature performances, two-thirds of all background performances, two-thirds of all theme performances, and so on. Logically, then, no matter how these types of performances are valued -- no matter what distinctions are made between different types of performances, or even if no distinctions are made at all -- ASCAP's and BMI's shares remain relatively constant at a two-to-one ratio.

133. Third, this valuation system is accepted not only by writers and publishers, but also by music users and the Tribunal itself. When works are licensed to users individually -- through licenses of synchronization rights and performing rights for theatrical film exhibition, for example -- the same basic differentiations in valuing different types of performances hold true. Indeed, when music users have attacked the blanket license and sought "per use" or "per composition" licenses, they have made the same differentiations in the values of different types of

(footnote continued from previous page)
familiar to a viewer as a result of pre-1987 performances has an obvious impact on its value in 1987. An example is the use of "White Christmas", or any other standard, as background music to create a desired effect. That additional value should not be disregarded here.

performances -- for example, when the CBS television network sought a "per use" license in antitrust litigation, or when the public broadcasters argued for a "per composition" fee before the Tribunal in the 1978 Noncommercial Broadcasting Rate Adjustment Proceeding. CBS v. ASCAP, 400 F. Supp. 737, 747 n. 7 (S.D.N.Y. 1975); 43 Fed. Reg. 25,069.

134. The Tribunal itself has recognized these distinctions in value. In every noncommercial broadcasting rate adjustment proceeding, when it has fixed compulsory license fees on an individual basis for copyright owners, it ~~has done~~ what ASCAP and BMI do -- set a higher rate for feature performances than for background and theme performances. Id. at 25,071; 47 Fed. Reg. 57,926; 1987 Noncommercial Broadcasting Rate Adjustment Proceeding, 52 Fed. Reg. 49,010, 49,011-49,012 (1987).

135. Fourth, this valuation system has all the hallmarks of reliability which make it proper for Tribunal use. It has been used for decades by both ASCAP and BMI, to distribute billions of dollars to tens of thousands of writers and publishers.

136. BMI has argued that this kind of valuation system -- which includes its own distribution system as well as ASCAP's -- should be rejected because the ASCAP distribution system which uses it is not replicable by BMI.

The answer to BMI's argument is simple: BMI need not be able to replicate the studies to know they are reliable. After all, claimants could not "replicate" the Nielsen special study -- it is far too complex and detailed. But that does not mean it should be rejected. To the contrary, because of the proven reliance on its results in the marketplace, comparable to the marketplace's proven reliance on the ASCAP distribution system, both are entitled to great weight here.

137. The ultimate proof that ASCAP's approaches yield the proper result is BMI's own study. When the music which BMI omitted is added to the study and the obvious methodological flaws are corrected, the result is comparable to ASCAP's approaches. On this record, any system which measures the music actually performed on distant signals in 1987 yields a two-thirds share to ASCAP.

1. ASCAP's Four Approaches Show That ASCAP's Share of Music Actually Performed on Distant Cable Signals in 1987 is Between 65% and 72%

138. ASCAP's first approach -- its survey of the top 53 distant signals -- is reliable for many reasons. It is a properly "deep" sample -- the 53 stations sampled account for 90.68% of the fees generated in 1987. Its music use information was not compiled for this proceeding. Rather, it was gathered as part of ASCAP's normal distribu-

tion system, long before this proceeding commenced. Its results are the same even if the different levels of sampling music use station-by-station are equalized, and even if different values for different types of music use -- different weighting formulas -- are applied. It tallies all copyrighted music, ASCAP and non-ASCAP alike. It shows an ASCAP share of 67%.

139. ASCAP's second approach, the census of all 1987 performances on WTBS, also provides valuable information. WTBS is, by several orders of magnitude, the most significant distant signal. It accounts for 38% of the fees generated, and 44% of the Nielsen audience viewing. And the WTBS census has the virtue of being a census -- a count of all (or virtually all) the music performed on this significant station.

140. BMI argues that WTBS's programming mix -- and therefore, perhaps, its music mix -- are not typical of other distant signals. That may or may not be so. But if it is, that is not a reason for rejecting the WTBS census. To the contrary, WTBS's music use was what it was, and must be accounted for. The WTBS census is not dispositive of the issue before us -- ASCAP never claimed that it was. It is surely of great relevance in determining the music in signals that accounted for 38% of the fund, on a fee-

generated basis. And it is also significant because it confirms what ASCAP's 53-station survey shows -- that ASCAP's share is about two-thirds.

141. ASCAP's third approach, in which the WTBS census data is weighted by Nielsen audience viewing data, further refines this result. The Nielsen viewing data has never been useful in comparing Music, as a claimant group, with other Phase I claimant groups, because music runs throughout all program types. But in a Phase II proceeding between only two Music category claimants, the Nielsen viewing data is as useful as in other proceedings, in valuing the copyrighted works used. And, once again, the result is the same -- an ASCAP share of approximately two-thirds.

142. ASCAP's fourth approach is especially significant for two reasons. First, it analyzes music use across all the 120 stations Nielsen samples. Second, it uses the Nielsen viewing data across that sample, analyzing music on programs which account for 43% of all viewing of all programs. And again, the fact that ASCAP's share using this approach is approximately the same two-thirds gives credence and credibility to each of the four approaches. None are aberrational. Based on actual music use on distant signals in 1987, ASCAP's share should be about two-thirds.

2. ASCAP's Share of Music Actually Performed
on Distant Cable Signals in 1987 is 65%
Based on BMI's Durational Survey

143. BMI's durational approach has several conceptual shortcomings. The very idea of valuing all types of musical performances by duration alone offends common sense. It is simply not done in the music industry. Indeed, such a time-based valuation of different copyrighted works, without further justification, has been rejected in the copyright law.

144. For example, in Frank Music Corp. v. M-G-M, Inc., 886 F.2d 1545 (9th Cir. 1989), one of ten acts in a musical revue was held to have infringed plaintiff's copyright. The court held that it would have been error to attribute 10% of the profits from the entire show (for the 1 infringing act in 10) to plaintiff's work without also considering the "relative quality" of the show's several acts: "If the district court relied exclusively on a quantitative comparison and failed to consider the relative quality or drawing power of the show's various component parts, it erred. However, the district court's apportionment based on comparative durations would be appropriate if the district court implicitly concluded that all the acts of the show were of roughly equal value." Id. at 1548 (citations omitted).

145. In ABKCO Music, Inc. v. Harrisongs Music, 508 F. Supp. 798 (S.D.N.Y. 1981), it was held that George Harrison's song "My Sweet Lord" infringed plaintiff's copyright in "He's So Fine." Plaintiff argued that it was entitled to a portion of the mechanical royalties for the relatively unsuccessful songs released on the same album as "My Sweet Lord," even though those royalties would not have been earned but for the greater success of the hit song. The court noted that, although users pay the same mechanical royalty for each song on a given recording, whether memorable or not, "[c]ommon sense dictates that a hit song contributes more to the sale of a record than does a less popular song. In such circumstance, mechanical royalties paid to a composer for a less-than-memorable song on the record are, in fact, earned by the memorable song which has caused the public to purchase the record." Id. at 800. This supports the validity of the historical or "familiarity" factor in valuing performances.

146. In addition the ABKCO decision supports the use of the normal ASCAP and BMI surveys -- the distribution marketplace -- in determining royalties to be paid by users. The court noted that a determination of the total earnings allocable to "My Sweet Lord" could be made on the basis of BMI's radio survey: "This can be done on the basis of the

BMI monitoring of air play by disc jockeys of each of the Harrison songs that were included on the album 'All Things Must Pass'. The results of this monitoring are entitled to substantial weight, for they are the basis on which BMI pays performing royalties on its catalogue." Id. at 800, n.5. (emphasis added).

147. But if we accept BMI's notion of an analysis based on duration alone, two imperatives follow:

148. The first is that, for the distant signals and periods sampled, all music use must be tallied, and that tallying must be done accurately. BMI seriously erred in both these respects. It is a relatively simple matter to correct these errors, and ASCAP did so in rebuttal. When these errors are corrected, BMI's flawed methodology produces an ASCAP share of 58%.

149. The second imperative is that there can be no methodological flaws in the durational analysis. BMI's analysis contains two such flaws. The first is BMI's assumption that the music density of movies was the same as of series, and its resulting weighting of percentages of music duration on each program type by percentages of time occupied by each program type on each surveyed station. This resulted in wild aberrations. The second flaw was in BMI's claim to be using "Nielsen Data" -- which in the

context of these proceedings has always meant audience and viewing data -- when in fact BMI was merely putting a stopwatch to different program types. When these errors are also corrected, ASCAP's share, under BMI's durational approach, is 65%.

150. The uniformity of result of all these different approaches is convincing -- ASCAP is entitled to two-thirds of the royalty fund.

B. The Distribution Marketplace Provides the Proper Framework For the Tribunal's Decision

151. The 1976 Copyright Act requires that the Tribunal distribute cable compulsory license fees only to each copyright owner who establishes a claim that its work "was included" in distant non-network broadcast programming carried by cable systems. 17 U.S.C. § 111(d)(3).

152. The claimants in this Phase II proceeding are ASCAP and BMI, neither of which is a "copyright owner." Rather, ASCAP and BMI are "performing rights societies" as that term is defined in the Copyright Law, and universally recognized in the music industry: "A 'performing rights society' is an association or corporation that licenses the public performance of nondramatic musical works on behalf of the copyright owners." 17 U.S.C. § 116(e)(3) (emphasis added).

153. Thus, for purposes of this proceeding, ASCAP and BMI stand in the shoes of the writers and publishers each represents. Each is but a "common agent" for the copyright owners it represents. 17 U.S.C. § 111(d)(4)(A). Each organization may receive only those royalties to which its members and affiliates would be entitled if they appeared before the Tribunal for themselves, rather than through ASCAP and BMI.

154. The question, therefore, is how the Tribunal should fulfill its statutory obligation to distribute Music's Phase I Award, through ASCAP and BMI as "common agents," to those copyright owners whose works were actually performed on non-network programming carried as distant cable signals in 1987. In answering this question, we first look at history.

155. ASCAP and BMI have been involved in only one Phase II controversy between themselves, the 1978 Cable Royalty Distribution Proceeding -- the first distribution proceeding which the Tribunal conducted pursuant to the then newly-enacted 1976 Copyright Act. In that proceeding, a three-member majority of the Tribunal determined that the ASCAP/BMI split, after removing SESAC's share, was 55.7/44.3. 45 Fed. Reg. 63,041. A two-member minority voted for a higher ASCAP share -- a 62.0/38.0 split after

removing SESAC's share. 45 Fed. Reg. 63,044. For every year during the decade since the 1978 proceeding, ASCAP and BMI have been parties to confidential, voluntary agreements.

156. In the 1978 cable royalty distribution proceeding, it was not possible for the Tribunal to identify the music actually performed on distant cable signals or to measure the value of the performances. Neither the Larson Data, by which the relative significance of different stations' distant carriage may be measured, nor the Nielsen audience data, by which the relative significance of programs carried on those stations may be measured, existed at that time. Therefore, the Tribunal had to resort to factors only distantly related, if that, to the actual use of music on distant signals. The Tribunal drew its ultimate conclusion indirectly and by analogy to the music licensing marketplace.

157. The factors relied upon in 1978 were:

(a) total license fee revenues of the performing rights societies; (b) performing rights societies' shares of 1978 local television license rates; (c) performing rights societies' shares of 1978 television and radio performance credits^{29/}; (d) performing rights societies' shares of 1978

^{29/} The Tribunal might find significance in its use of the term "credits" in its 1978 determination. Evidently, the Tribunal accepted the use of the ASCAP and BMI distribution
(footnote continued)

jukebox royalty fees; (e) performing rights societies' shares of 1978 public broadcasting compulsory (for ASCAP) and voluntary (for BMI) license fees and voluntary licenses with educational institutions. 45 Fed. Reg. 63,041.

158. All but one of those 1978 factors are no longer relevant. First, the total license fee revenues of the organizations are useful only as a proxy for actual performance data. They are an inexact proxy, at that, for they include revenues from uses far removed from cable retransmissions.

159. The shares of all local television performance credits are relevant only to the degree that all television performances mirror performances on distant signals. As we know, the universe of distant signals is a very distinct subset of the universe of all television broadcasts. For example, WTBS makes up 38% of the distant signal universe -- far more than its share of the local television market. Yet, BMI maintains, WTBS's programming and music mix is very different from other local television stations. BMI cannot have it both ways. If WTBS, which is so significant in the distant signal universe, is very different from other local stations, then the overall music

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systems -- and the "credit" valuations they contain -- when it considered this factor in 1978.

use of all local television stations is not representative of distant signals, and this 1978 factor is now irrelevant.

160. The shares of radio performance credits are irrelevant for another reason. The Tribunal has determined -- and ASCAP and BMI have agreed -- that distant radio carriage is "de minimus," and "unquantifiably small." As such, radio performances are no proxy for distant television signal performances. Indeed, they are not even useful for the unquantifiably small portion of the cable royalty fund attributable to radio. The mix of distant radio signals does not mirror the mix of all radio broadcasts, and the commercial radio station most heavily carried as a distant signal is 86% ASCAP.

161. There is no relevance whatsoever to the ASCAP-BMI 1978 jukebox voluntary agreement. It is 10 years out of date. All subsequent agreements have been confidential. The 1978 agreement was made on a nonprecedental basis. And no analogy between jukebox performances and performances on cable retransmissions has even been shown -- as evidenced by the fact that ACEMLA (jointly with Italian Book Corp.) received 0.12% of the 1985 jukebox fund, an award of approximately \$6,600, but an award of only \$1 from the 1985 cable fund. 1985 Jukebox Royalty

Distribution Proceeding, 52 Fed. Reg. 46,324 (1987); 53 Fed. Reg. 7,132.

162. The public broadcasting license fees are not only irrelevant, but unknown because BMI has chosen to keep its fees secret. No comparison is possible. And BMI's use of Tribunal-determined non-NPR noncommercial radio compulsory license fees is improper in view of the Tribunal's decision that their fees were not to be used in this or any other proceeding.

163. All that is left is the relative local television license rates. At first glance, they would appear to be 59.5% ASCAP, 40.5% BMI. But that appearance is misleading. ASCAP has not reached any agreement with the local television broadcasters. And BMI's agreement, from which the split is derived, was part of a package deal in which BMI gave more than a license in order to get a higher license fee. If the local television license is to be used at all, it may only be as the floor for ASCAP's award, not the ceiling as BMI would have it.

164. Deprived of support for the 50/50 split it seeks by its own "objective survey", BMI turns to sheer speculation about the licensing marketplace. First, it introduces license agreements which, though more favorable to BMI than the distant signal music use data, have no

relation to music use in distant signals. The fact that an all-country music cable origination service paid BMI more in 1987 than it paid ASCAP has no conceivable bearing on the hypothetical distant signal marketplace, as distant signals use an entirely different music mix. The cable origination services like Showtime not only also have different music mixes than distant signals, but are paying fees subject to adjustment if the pending appeal of the Showtime decision is successful.^{30/} Fees paid by networks in 1987 are irrelevant because network programming is specifically excluded from the cable compulsory license. Fees to be paid after 1987 are irrelevant for this proceeding.

165. BMI thus falls back on the speculation of its outside economist, Dr. Black, as to what a music user like a cable operator might do in acquiring performing rights in a free marketplace. That speculation is suspect, if for no other reason than that Dr. Black has no experience in negotiating for performing rights licenses -- he has "never" participated in such negotiations in any way. Tr. 1325 (Black).

166. What, then, is left of BMI's case? Mr. Berenson says music users want to pay ASCAP and BMI the same

^{30/} The Tribunal may take administrative notice of the fact that an appeal has been filed and is currently pending in United States v. ASCAP -- Application of Showtime/The Movie Channel. No. 90-6052 (2d Cir. filed January 8, 1990).

amount no matter what their music use, because both licenses are necessary. Yet, in almost no case do music users pay equal amounts to ASCAP and BMI. And the same "necessity" exists for a SESAC license, which never approaches the amounts either ASCAP or BMI collect. Mr. Berenson's own testimony regarding BMI's higher fee for Country Music Television and the Nashville Network explains why -- those cable origination services performed BMI music more than ASCAP music. As Ms. Messinger testified, music use is a key determinant of licence fees in negotiations, and that is the determinant the Tribunal should look to here.

167. The Tribunal will change a prior determination only upon a showing of "changed circumstances." The true "changed circumstance" here is the availability of data which measures the relative shares of actual performances for distant signals in 1987.

168. The Larson Data, which was not available in the 1978 proceeding, allows the Tribunal to identify and ascertain the relative significance of television stations carried as distant cable signals. The Nielsen audience data, which was also not available in the 1978 proceeding, allows the Tribunal to determine the relative significance of individual programs.

169. Larson Data and the Nielsen audience data, used in conjunction with survey evidence identifying the music performed on television, provide the Tribunal with a direct and accurate means of identifying and valuing the music which was actually performed on non-network programming carried as distant cable signals in 1987. In this proceeding, therefore, the availability of the Larson Data and the Nielsen audience data used in conjunction with survey evidence constitutes the "changed circumstance." Pursuant to its statutory mandate, the Tribunal should use that information to determine which copyrighted works were carried on distant signals in 1987, and properly compensate the copyright owners for that carriage.

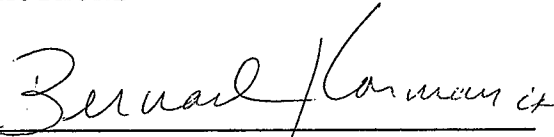
170. Upon careful review of the entire record, one overridingly significant fact emerges: BMI's survey evidence supports ASCAP's claim. When BMI's errors and omissions in tallying music are corrected, BMI's own survey yields an ASCAP share of 58%. When BMI's methodological flaws are also corrected, ASCAP's share is 65%. These facts reinforce the results of ASCAP's four approaches, and confirm the propriety of ASCAP's claim.

VI. CONCLUSION

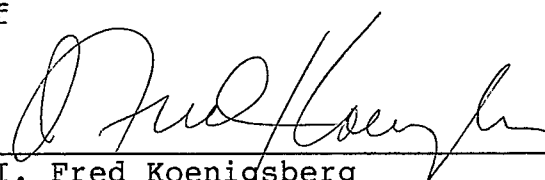
171. ASCAP is entitled to 67% of Music's Phase I Award and BMI is entitled to the remainder.

Respectfully submitted,

AMERICAN SOCIETY OF COMPOSERS,
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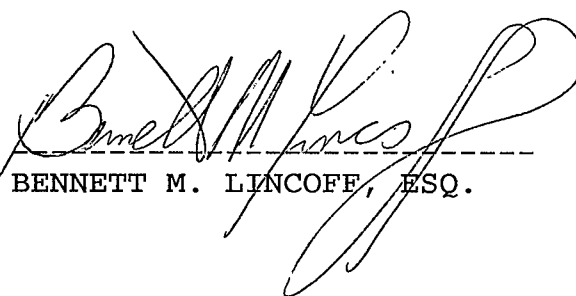

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Dated: February 9, 1990

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Proposed Findings of Fact and Conclusions of Law of the American Society of Composers, Authors and Publishers were served on February 9, 1990 by hand delivery on the following:

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February 15, 1990


re 1987 Cable Royalty Distribution Proceeding
(Docket No. 89-2-87CD)

Honorable J.C. Argetsinger
Copyright Royalty Tribunal
1111 20th Street, N.W.
Washington, D.C. 20036

Dear Chairman Argetsinger:

Through an inadvertant omission, ASCAP's Proposed Findings of Fact and Conclusions of Law did not include a table of contents. Six copies of such a table of contents are enclosed.

Respectfully



I. Fred Koenigsberg

cc: Charles T. Duncan, Esq.

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